

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THERE HAVE BEEN NO NEW FACTS PRESENTED THAT JUSTIFY REVISITING THE COMMISSION'S ENTREPRENEUR'S BLOCK FRAMEWORK.....	5
III. THE COMMISSION HAS PROPOSED A COMPROMISE THAT, IN GENERAL, MAY MITIGATE SOME OF THE HARMFUL EFFECTS OF RULE CHANGES ON DESIGNATED ENTITIES.....	13
A. All 30 MHz C-Block spectrum blocks in the upcoming reauction can be disaggregated into 10 MHz and 20 MHz blocks.....	14
B. In the largest U.S. markets, there should continue to be a minimum of 10 MHz of spectrum set aside for Entrepreneurs, but 20 MHz disaggregated licenses could be subject to "open bidding" in each of these markets.	14
C. In Tier 2 markets, a new 20 MHz disaggregated license derived from former 30 MHz licenses must be set aside for Entrepreneurs, and the new disaggregated 10 MHz license could be subject to "open bidding."	16
D. Existing 10 MHz F-Block licenses should remain set aside as Entrepreneur's Block licenses.....	17
E. Entities qualifying as Very Small Businesses and Small Businesses under FCC rules in all circumstances should be afforded bidding credits for all licenses to be auctioned	19
F. Current C- and F-Block transfer restrictions should be maintained.....	20
G. The existing Commercial Mobile Radio Service (CMRS) spectrum cap (45 MHz in urban areas and 55 MHz in rural areas) must remain in place.....	20
IV. CONCLUSION.....	21

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of

**Amendment of the Commission's
Rules Regarding Installment Payment
Financing for Personal
Communications Services (PCS)
Licenses**

)
)
)
)
)
)
)

WT Docket No. 97-82

COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc., on behalf of itself and its affiliated entities ("collectively, "Leap"), hereby offers further comment in connection with the above-captioned Further Notice of Proposed Rulemaking.¹

I. INTRODUCTION AND SUMMARY

The present *Further Notice* is framed against numerous waiver and rulemaking petitions filed by the nation's largest wireless carriers² that seek to use the Commission's announced upcoming reauction of C- and F-Block PCS licenses³ as the impetus for the Commission to eliminate its policy of reserving a portion of PCS spectrum as "Entrepreneur's

¹ Further Notice of Proposed Rulemaking, WT No. 97-82 (rel. June 7, 2000) ("Further Notice").

² The leaders of the assault on Entrepreneur's Block eligibility requirements have been SBC and Nextel, joined in later phases by AT&T Wireless, BellSouth, Bell Atlantic Mobile (now, in the wake of the Bell Atlantic-GTE merger, Verizon Wireless), and U.S. West. The petitions and relevant docket and notice numbers are summarized in the *Further Notice* at note 3, and Leap hereby incorporates by reference its earlier filings made in connection with all of these dockets and proceedings.

³ Public Notice, "Auction of Licenses for C and F Block Broadband PCS Spectrum Postponed Until November 29, 2000," DA 00-1246 (June 7, 2000); Public Notice, "Auction of C and F Block Broadband PCS Licenses," DA 00-49 (Jan. 12, 2000).

Block" licenses – spectrum intended by the Commission, in accordance with Congressional mandate, to be used by small businesses and other Designated Entities to bring their unique variations of competition and innovation to the wireless telecommunications marketplace.

In the *Further Notice*, the Commission has proposed a compromise plan that would reconfigure and significantly reduce the amount of PCS spectrum that has been reserved for entrepreneurial companies and small businesses. Yet, for all of the pages of comment the Commission has received to date, Leap remains astonished at the paucity of record evidence or persuasive policy reasoning that would justify altering the current Entrepreneur's Block rules and spectrum allocation.

The arguments of the big carriers, summarized in the *Further Notice*, in essence boil down to two claims: first, the supercarriers continue to place much emphasis on the fact that several large C-Block licensees covering many major markets declared bankruptcy, which has delayed for several years the deployment of service in those markets using C-Block spectrum; second, the large carriers claim spectrum poverty, and argue that they absolutely require additional spectrum to supplement their nationwide footprints and to offer advanced wireless services.⁴ Both claims, however, do not withstand scrutiny, and certainly are not supported by the current record.

By now, the disingenuous nature of pointing simply to the lack of deployment by bankrupt C-Block licensees as a reason to scale back or eliminate the Entrepreneur's Block should be apparent to the Commission. To be sure, the Entrepreneur's Block policy has had a troubled history, but since the Commission's elimination of installment payments, and in the wake of a successful reauction of C-Block PCS licenses in Auction No. 22, the marketplace is

⁴ *Further Notice* at ¶ 14.

proving that Entrepreneurial businesses such as Leap are bringing innovative services to the public and are beginning to thrive. Without the skewed incentives created by generous government-sponsored installment financing, the wisdom of the Entrepreneur's Block policy is finally being proven in the CMRS marketplace.

In addition, although the *Further Notice* nods to the large carrier pleas for more spectrum "to satisfy congestion, new technology and competitive needs,"⁵ these general conclusions are unsupported by data or record evidence. The Commission has in the past considered and rejected arguments that are virtually identical to those that have been raised in the current proceeding by the large carriers, and Leap continues to ask the question: What has changed? The large carriers should bear the burden of demonstrating with detail and specificity the capacity need that they claim necessitates a dramatic alteration of the Commission's rules. They simply have not done so. Indeed, the evidence suggests strongly that the nation's largest carriers most likely will use Entrepreneur's Block spectrum merely to add more of the same mobile voice telephony to their collective base of existing wireless consumers (and, not coincidentally, block more competitive uses), rather than use the spectrum more efficiently or provide innovative services to new wireless users. This result is not in the public interest.

If the Commission remains fixed on a course of changing the rules to provide large carriers with access to some additional spectrum at the expense of smaller companies, Leap believes that the compromise proposal in the *Further Notice* may mitigate some of the negative effects on small businesses and other Designated Entities, and will ensure some measure of continued participation by these companies in spectrum-based services. Accordingly, to the extent that rule changes can be supported, Leap believes that the following actions could be

⁵ *Id.* at ¶ 26.

taken without destroying the viability of the Entrepreneur's Block concept or existing entrepreneurial businesses that have relied upon the current rules:

- 30 MHz Entrepreneur's Block C-block licenses could be reconfigured into 10 MHz and 20 MHz licenses.
- The Commission can to create a two-tiered regime above and below a specified population threshold; Leap believes that this threshold should be 5 million pops.
- In the very largest "Tier 1" U.S. markets there would continue to be an Entrepreneur's Block set aside of 10 MHz. All qualified bidders, including non-Entrepreneurs, would be eligible to bid for 20 MHz of spectrum in each of these markets.
- In "Tier 2" markets, a 20 MHz disaggregated license derived from former 30 MHz licenses must be set aside for Entrepreneurs, and one 10 MHz license can be opened up to all qualified bidders, including non-Entrepreneurs.
- Entities qualifying as Very Small Businesses and Small Businesses under FCC rules in all circumstances should be afforded a 45% or 35% bidding credit, respectively, for all licenses to be auctioned, whether subjected to "closed" or "open" bidding.
- Current C- and F-Block holding/transfer requirements should be maintained.
- The existing Commercial Mobile Radio Service (CMRS) spectrum cap (45 MHz in urban areas and 55 MHz in rural areas) should remain in place.

Leap elaborates on all of these points further below. One point that deserves special attention, however, is the Commission's suggestion in the *Further Notice* that F-Block licenses may be subjected to "open bidding" and effectively ceded to the large carriers.⁶ Although the F-Block licenses have been the one constant of stability in the Entrepreneur's Block program amidst the storm surrounding the restructuring of the C-Block component, the Commission (ironically) uses this very point to query whether the distinction might be a reason to eliminate the F-Block entirely.

⁶ *Id.* at ¶ 31.

Respectfully, Leap believes that such reasoning turns the policy of the Entrepreneur's Block on its head. The fact that the F-Block licenses have not had the same troubled history as the C-Block is completely irrelevant as a justification for taking even more spectrum away from Entrepreneurs. When it created the Entrepreneur's Block, the Commission guaranteed that 40 MHz of spectrum out of the total broadband PCS allocation would be made available for Entrepreneurs. Without touching the F-Block, the Commission's compromise proposal already would cut the Entrepreneur's Block allocation by *half* in taking a full 20 MHz away from Entrepreneurs in Tier 1 markets, and by a quarter in taking 10 MHz from Entrepreneurs in Tier 2. Given the extremely weak showing of capacity need by the large carriers, taking yet *another* 10 MHz by eliminating the F-Block is an extreme and totally unjustified step. Existing 10 MHz F-Block licenses should remain set aside as Entrepreneur's Block licenses. Leap strongly urges the Commission not to exacerbate the penalty imposed on entrepreneurial companies depriving them of access to this important spectrum as well.

II. THERE HAVE BEEN NO NEW FACTS PRESENTED THAT JUSTIFY REVISITING THE COMMISSION'S ENTREPRENEUR'S BLOCK FRAMEWORK

While Leap below addresses the compromise proposal that is the crux of the *Further Notice*, Leap once again urges the Commission, as a threshold matter, to probe carefully the large carrier assertions that have whipped up a frenzy of perceived need for changing the Entrepreneur's Block rules. The general statements provided by these carriers simply offer no basis for revisiting any aspect of the Commission's Entrepreneur's Block eligibility rules, and are not accurate in any event. The Commission has dealt repeatedly with the precise arguments that Nextel and SBC, for example, have resurrected to argue for sweeping revision of the rules, and has concluded repeatedly that there has been no valid public interest reason proffered to justify deviating from the policy balance embodied in maintaining the Entrepreneur's Block eligibility

restriction.⁷ Indeed, when Nextel on reconsideration argued that PCS licenses subject to reauction should be opened to "all qualified bidders," the FCC again found – just more than a year and a half ago – that the record provided "no basis to alter our decision" regarding the preservation of Entrepreneur's Block eligibility restrictions.⁸

As Leap has stated before, and reiterates here, the fundamental question raised in this proceeding is the following:

What changes in the wireless marketplace have occurred since the Commission's most recent affirmations of the Entrepreneur's Block eligibility and spectrum cap rules (that is, August 1998, and August 1999, respectively) that should cause the Commission to sacrifice the current and potential benefits to carriers and consumers of the Entrepreneur's Block regime?

Leap again respectfully suggests that, in answering this question, the Commission must insist upon more than vague and self-serving assertions of capacity need by large carriers that simply do not hold up under scrutiny.

For example, in offering up a compromise proposal, the *Further Notice* nods to the large carrier claims that they need Entrepreneur's Block spectrum to "increase the size of subscriber 'footprints,'" and to assuage "competitive need"⁹ Yet, Leap does not understand why these conclusory assertions by the supercarriers, even if they were supported by data or record evidence (which they are not), appear to have been accepted by the Commission at face value as reasons to severely pare back the Entrepreneur's Blocks.

⁷ See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82 (rel. Mar. 24, 1998), at ¶ 69.

⁸ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Fourth Report and Order*, WT Docket No. 97-82 (rel. Aug. 19, 1998), at ¶ 16.

⁹ *Further Notice* at ¶¶ 26.

With respect to the enhancement of supercarrier footprints, it is important to recognize that the trend towards regional or national expansion in the provision of CMRS services was *expressly accounted* for in the existing PCS allocation. In 1993, the Commission stated:

[T]here has been a great amount of consolidation of the MSA/RSA markets in the cellular service, which may have been driven by the greater economies of scale and scope in larger cellular operations. This consolidation has resulted in unproductive regulatory and transaction costs in the assignment process for cellular. We believe that larger PCS service areas, such as MTAs and BTAs, will minimize these problems. In addition, large PCS service areas also may facilitate regional and nationwide roaming; allow licensees to tailor their systems to the natural geographic dimensions of PCS markets; reduce the cost of interference coordination between PCS licensees; and simplify the coordination of technical standards. Further, BTAs and MTAs offer large service areas and therefore are complementary with and will facilitate the coordination and negotiation processes associated with the microwave relocation activities that will be necessary in many cases.¹⁰

Thus, the Commission understood even at the time that spectrum was allocated to PCS that the trend in the mobile wireless telephony market was towards consolidation into large regional and nationwide service areas. The Commission nonetheless decided that the public interest would be served by allocating a limited portion of PCS spectrum to Entrepreneurs. The fact that continued consolidation has occurred as the Commission predicted is hardly a "new" market condition or changed circumstance that warrants a revisitation of that decision. If anything, the increased concentration of licenses and possible market power resulting from such consolidation is all the more reason to preserve the diversity of CMRS service provision promoted by the Entrepreneur's Block policy, not chip it away.

¹⁰ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, 7732, ¶ 74 (1993) (footnotes omitted).

In addition, it is also clear from marketplace developments that the creation of nationwide footprints does *not* require the transfer of Entrepreneur's Block spectrum to the supercarriers. Recently, the Commission has approved two separate merger transactions, between Bell Atlantic Corporation and between Vodaphone AirTouch Plc,¹¹ VoiceStream Wireless Corporation and Aerial Communications, Inc. that will result in the creation of "two new national wireless carriers."¹² These actions were followed by the announcement of the agreement by BellSouth and SBC Communications to combine their wireless operations to create the second largest wireless carrier in the country.¹³ And carriers such as AT&T and Nextel continue to provide ubiquitous nationwide service. The wireless marketplace plainly is addressing the nationwide footprint demand without the need for Entrepreneur's Block spectrum to be sacrificed.¹⁴

Similarly without foundation or record support are the large carrier "capacity concerns" and the alleged need for spectrum to provide "advanced services."¹⁵ Just nine months ago, the Commission found that few carriers have accumulated as much as 45 MHz of spectrum in any one market and that, in general, "carriers with 45 MHz are not currently using their entire spectrum allocation."¹⁶ This finding still appears to be accurate and has not been refuted in the

¹¹ Bell Atlantic and Vodaphone have announced that the brand name for this joint venture will be "Verizon Wireless." See Communications Daily, "Verizon Wireless Starts Service With Nationwide Pricing Plan" (April 5, 2000).

¹² Public Notice, FCC Bureaus Approve Bell Atlantic Vodafone and VoiceStream/Aerial License Transfers and Assignments – Two New National Wireless Competitors to be Created (rel. Mar. 30, 2000).

¹³ See Communications Daily, "BellSouth and SBC Merge U.S. Wireless Operations" (April 6, 2000).

¹⁴ Significantly, AT&T has been able to expand its footprint by entering into affiliation arrangements with Entrepreneur's Block licensees. There is no reason that large carriers cannot continue to partner with DEs in this fashion.

¹⁵ *Further Notice* at ¶¶ 3, 20, 30.

¹⁶ 1999 Spectrum Cap Order at ¶ 65.

current record. Nor have the large carriers convincingly argued that competition—and the opportunity that C-Block spectrum represents for small businesses—must be sacrificed to implement third-generation ("3G") wireless data systems. They produce no evidence whatsoever that the 45 MHz allowed under existing spectrum cap rules is inadequate for this purpose, especially given that the precise spectrum needs of 3G are unknown.¹⁷ Indeed, Sprint has acknowledged that current technology (and spectrum) will "suffice for many years,"¹⁸ and that the actual spectrum needs for 3G are unlikely to require the large amounts of spectrum requested by the large carriers.¹⁹ AT&T has similarly rebuffed suggestions that its network is capacity constrained.²⁰

Spectral capacity using digital transmission technology has continued to increase dramatically in the past 5 years. While there were periods during the conversion to digital where carriers were not realizing large capacity increases, the technology advances and "re-tooling" of the vendors during the past several years has yielded tremendous gains. New subscribers this year, using the latest CDMA digital upgrades, use less than 1/10 of the network capacity per minute of use than analog subscribers, and less than 1/2 the capacity per minute of use of those added as recently as last year using first generation digital technology. Indeed, Leap's "Cricket" service has made full use of the efficiency afforded by new technology to provide unlimited phone use at a low price. Further technology improvements expected this year and next include

¹⁷ See, e.g., *Id.* at ¶ 61 ("the assertions in the record along these lines are very general and do not provide any concrete evidence regarding the amount of spectrum that will be needed for 3G technologies or exactly when carriers will need access to that spectrum").

¹⁸ Sprint PCS Opposition, DA 00-318, at 5 (quoting *Global Wireless*, "GSM Networks to Survive in 3G Era" at 17 (Jan. 1, 2000)).

¹⁹ *Id.* at 4-5.

²⁰ See "AT&T's 'Debate'? Look Again," *The Wall Street Journal* (May 23, 2000), at A27 (Chief Technology Officer of AT&T maintains that deployment of EDGE technology upgrade to allow voice and data services "will not depend on any new wireless spectrum").

the evolution of existing systems (in the existing spectrum) that will provide 70% more network capacity through the 1XRTT air interface (the first phase of 3G for CDMA), and 45% additional capacity through new vocoders. The fact is that high capacity voice technology is here today, and will improve tomorrow.

Cellular carriers, however, are not converting customers to digital quickly, instead allowing a slow migration to occur - and keeping analog prices high. As reported in *Wireless Week*, more than 50% of Bell Atlantic Mobile's existing subscriber base remains analog.²¹ Reports from other large wireless carriers are similar. Thus, these carriers must use the majority of their existing 25 MHz of cellular spectrum to accommodate less efficient technology.

While continuing to support analog service may make business sense to large carriers, such inefficient use of the spectrum should not be rewarded with an additional spectrum transfer from Designated Entities. This is especially the case when other sources of spectrum are clearly available, such as the Commission's upcoming 700 MHz auction in the fall.

Finally, none of the large carriers' arguments leads to the conclusion that only the largest carriers, as opposed to Entrepreneurs, should be able to obtain more spectrum to offer 3G services. To the contrary, as the Commission concluded just nine months ago, permitting the largest carriers to acquire vast amounts of spectrum at some point begins to work *against* the goal of developing innovative new services, because the market has “fewer competitors, less innovation and experimentation, higher prices and lower quality.”²² Permitting Entrepreneurs to have continued access to spectrum for the delivery of combined voice and data service promotes diversity of service in the wireless marketplace and is in the public interest.

²¹ "CDMA: the Secret of BAMS' Success," *Wireless Week* (April 3, 2000), at 46.

²² 1999 Spectrum Cap Order at ¶ 62 (citations omitted).

Leap, for example, has been rapidly acquiring and deploying the Cricket voice service using a range of spectrum block sizes. As a participant and winner of 36 C-Block licenses in the FCC's April 1999 reauction of C-Block PCS spectrum, Leap has introduced into the wireless marketplace an innovative service model that offers consumers a low flat-rate of \$29.95 per month. The plan is in many ways the opposite of the ubiquitous national or regional plans offered by the large super-carriers. The Cricket "around town phone" is fundamentally local: it works only in the local service area, with no roaming capability, and any long distance calls must be placed through a prepaid calling arrangement. By simplifying its rate structure and billing costs, and by eliminating the costs of acquiring and building a national roaming network, Leap is able to offer to consumers an exceptional value.²³

Leap generally caters to a market segment that the larger wireless players overlook. The vast majority of Leap's target markets is comprised of small- to mid-sized metropolitan areas that are regarded within the industry as "secondary markets" with less potential for wireless growth. These markets may have fewer of the business executives and professionals to whom the larger carriers tailor their plans, but the Cricket service plan deliberately caters to the mass market. Cricket reaches out to those consumers who do not need, and in many cases could not pay for, the service offerings of the national supercarriers. Approximately 44 percent of Cricket customers work in blue-collar, clerical or service jobs, and

²³ Indeed, in addition to targeting and increasing penetration among traditionally underserved populations, Cricket's service plan offers a realistic alternative to landline telephony. At \$29.95 a month, Cricket is priced competitively with local residential rates. Thus, for example, a family that might otherwise add a second wireline (for its teenagers, perhaps, or to supplement a line that is increasingly used for Internet access) could subscribe to Cricket instead – saving on installation costs and acquiring the convenience of mobile telephony. The idea of a complete wireless landline replacement is particularly attractive for college students, servicemen, and others who are often away from their residence.

for many of these customers Cricket is the *only* service that can meet their needs. One-half of Cricket customers have never used wireless before.

Leap expects that, with a minimum of 20 MHz, it will be able to expand upon the momentum created by the innovative Cricket voice offering to offer data services in a fashion that the large mobile wireless carriers cannot or will not choose to replicate. And Leap's track record to date shows the skewed logic underlying the assertion that large carriers will make more efficient use of larger blocks of spectrum. Indeed, in many instances, it is cheaper for the large wireless carriers to pay for spectrum, even at a premium, to support aging infrastructure (and in some cases, a significant amount of inefficient analog spectrum use), rather than to upgrade infrastructure and equipment to become more spectrally efficient. Carriers such as Leap are proving that Entrepreneurial companies are indeed building innovative services from the ground up, and are introducing cheaper, more efficient and more affordable wireless service to a significant class of wireless consumers that has never used wireless before. Limiting or cutting off entirely the growth of such services merely to allow large carriers to absorb more spectrum to support existing mobile wireless operations is not "efficient" spectrum use -- and it is not in the public interest.

The Commission's 1997 restructuring of PCS financing options caused it to reassess the correctness of the threshold policy judgment that some PCS spectrum could and should be developed by smaller entities capable of bringing innovation and competition to the services offered by large incumbent providers. In implementing its restructuring options, the Commission considered and balanced the following policy goals: (i) maintaining the integrity of its rules and auction processes; (ii) ensuring fairness "to all participants in our auctions, including those who won and those who did not, as well as licensees in competing services"; (iii)

resolving issues now in a manner that does not merely postpone the problem; (iv) “[c]omplying with the mandate of our auction authority in Section 309(j) of the Communications Act . . . that we ensure ‘that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. . .’”; and (v) promoting economic opportunity and competition in the marketplace.²⁴ After assessing these factors, the Commission affirmed the viability of the Entrepreneur's Blocks.

Although the large carriers – and the *Further Notice* -- suggest in conclusory fashion that profound changes have occurred that should cause the Commission to modify this policy balance, these claims simply are not supported with sufficient data or explanation. And the *Further Notice*, in proposing a new spectrum plan, does not adequately explain why it needs to do so in the wake of its successful reauction of Entrepreneur’s Block licenses consonant with its aforementioned policy goals. As the success of this reauction shows, any problem with the Commission’s original C-Block rules has since been remedied. There has been no rational basis proffered to reconsider the rules.

III. THE COMMISSION HAS PROPOSED A COMPROMISE THAT, IN GENERAL, MAY MITIGATE SOME OF THE HARMFUL EFFECTS OF RULE CHANGES ON DESIGNATED ENTITIES

Leap continues to believe that there has been no adequate legal or policy basis proffered by any of the large wireless carriers that can justify eliminating the Entrepreneur's Block rules and policy. Nevertheless, Leap believes that if the Commission remains fixed on a course of changing the rules to provide large carriers with access to some additional spectrum at the expense of smaller companies, the compromise outlined in the *Further Notice* may mitigate

²⁴ *Id.* at ¶ 2.

the negative effects on small businesses and other Designated Entities, and will ensure some measure of continued participation in by these companies in spectrum-based services. Leap addresses the key elements of the Commission's proposal below.

A. All 30 MHz C-Block spectrum blocks in the upcoming reauction can be disaggregated into 10 MHz and 20 MHz blocks.

In the event that the Commission decides that large carriers should be permitted to access a portion of the spectrum currently allocated to the C-Block, Leap believes that the spectrum can be sensibly disaggregated into spectrum blocks that can be easily integrated into large carrier businesses, while also ensuring the continued opportunity for Entrepreneurs to grow their businesses. Thus, to the extent that the Commission reauctions 30 MHz C-Block licenses, Leap believes that it would not work a hardship for Entrepreneurs if these licenses were disaggregated into one 10 MHz and one 20 MHz block. 10 MHz licenses are already present in the PCS marketplace in the form of F-Block licenses, and therefore creating more of them should not cause radical change in Entrepreneur business plans or increase the cost of PCS equipment. However, it is *imperative* that Entrepreneurs are provided with continued access to enough set aside spectrum (20 MHz) to offer combined voice and data services in a significant number of markets. Leap believes that the creation of a 20 MHz license, at least with respect to Tier 2 markets, will preserve this objective.

B. In the largest U.S. markets, there should continue to be a minimum of 10 MHz of spectrum set aside for Entrepreneurs, but 20 MHz disaggregated licenses could be subject to "open bidding" in each of these markets.

On balance, Leap supports the Commission's proposed creation of two "Tiers" of BTAs keyed to a geographic population threshold, which is a proxy for the Commission to

separate out the largest U.S. markets where it is alleged that smaller carriers will find it more difficult to survive.²⁵

Initially, however, Leap takes issue with the assumption underlying the tiered approach that DEs would not find it desirable or would not be able to deploy service in even the largest of markets. While that assumption might be valid if a smaller carrier were simply intending to enter the market as a fifth or sixth mobile wireless provider, it is not valid if the DE is providing an innovative service that is not being provided by other carriers. Such is the case with Cricket service today.

For this reason, Leap believes the line that the Commission has drawn between "large" and "small" markets may not be high enough in terms of population threshold. Even a Tier 1 cut-off of 2.5 million pops could render a severe disservice to Entrepreneurs intent on serving all but perhaps the very largest U.S. markets. For example, Pittsburgh, Pennsylvania is a city with more than 2.5 million potential subscribers where Leap has a pending agreement to acquire Entrepreneur's Block PCS spectrum, and in which Leap intends to roll out the Cricket service model. And while Leap has no current plans to serve the very largest markets in the United States (*i.e.*, over 5 million pops) there are other Entrepreneurs that have indicated their intent to do so.

In Leap's view, any geographic service cut-off that completely eliminates Entrepreneurial access to any individual U.S. market – for example, by limiting Entrepreneurs only to bidding credits above a certain population level-- is inherently arbitrary and needlessly discriminatory towards DEs.²⁶ However, if the Commission indeed has a rational basis to

²⁵ *Id.* at ¶ 30.

²⁶ *See Further Notice* at ¶ 29.

conclude that additional capacity is needed for large carriers to expand service in the nation's largest markets, Leap believes that the Commission should continue to retain a 10 MHz set aside for DEs in these markets, but open up the other 20 MHz derived from former 30 MHz C-Block licenses to all qualified bidders.²⁷

Although a 2.5 million population threshold would not be disastrous, Leap proposes that the Commission's geographic threshold for the separation of Tier 1 and Tier 2 markets be 5 million pops. This would allow carriers in the nation's largest markets – such as New York, Los Angeles, San Francisco, and Philadelphia -- to access a tremendous amount of additional spectrum, while preserving the ability of Entrepreneurs to introduce innovative niche services into these markets.

C. In Tier 2 markets, a new 20 MHz disaggregated license derived from former 30 MHz licenses must be set aside for Entrepreneurs, and the new disaggregated 10 MHz license could be subject to "open bidding."

In the so-called "Tier 2" markets, the Commission must weigh the benefits of providing large carriers with access to spectrum against the prospect of decreasing the spectrum currently made available to Entrepreneurs. Given that markets below 5 million pops (and certainly the 2.5 million pops proposed in the *Further Notice*), are the primary markets in which DEs are deploying, and will continue to be so, it is important that the Commission not only continue to provide these companies with access to Entrepreneur's Block spectrum, but also ensure that these companies maintain a viable spectrum allocation that will provide them with the ability to bring innovative voice and data offerings to market.

²⁷ Above Tier 1, Leap takes no position on whether this 20 MHz that would be subjected to open bidding takes the form of a disaggregated 20 MHz license or two 10 MHz licenses. However, Leap believes that it is important that the license created to serve Tier 2 be a 20 MHz license that will ensure an Entrepreneur's ability to access enough spectrum to offer voice and data services.

Unlike larger carriers, newer Entrepreneurial companies have the advantage of being able to deploy the most current technology in conjunction with targeted, efficiently designed systems. Thus, while a nationwide supercarrier may need to add 10 MHz of spectrum to an existing 30 MHz allocation to deploy wireless data offerings, a newer entrant such as Leap can deploy an innovative voice and data offering using far less spectrum, such as 20 MHz.

For this same reason, however, relegating DEs to 10 MHz only in Tier 2 markets should *not* be an option.²⁸ Even using the most efficient technology, combined voice and data is a tall order. DEs should not be denied the opportunity to roll out such combined offerings. This was an opportunity guaranteed them in the existing C-Block allocation (either 15 or 30 MHz licenses), and it should not be taken away now. The Commission should maintain a disaggregated 20 MHz set aside for Entrepreneurs in Tier 2.

D. Existing 10 MHz F-Block licenses should remain set aside as Entrepreneur's Block licenses.

The Commission should preserve existing F-Block allocations. As a part of the balance in reallocating Entrepreneur's Block spectrum to larger carriers, it is important and pro-competitive for these Entrepreneur's Block spectrum allocations to be preserved.

Surprisingly, the *Further Notice* seeks comment on whether F-Block licenses should be subjected to "open bidding." In considering this idea, the Commission suggests that opening up this portion of the Entrepreneur's Block spectrum might be warranted by the fact that the F-Block generally has not been subject to the same restructuring as the C-Block (because bidding in the F-Block auction was much more reasonable), and therefore "we may not be faced

²⁸ *See id.*

with the same equity considerations in maintaining a set-aside of F-Block spectrum as we are for C-Block."²⁹

Respectfully, Leap believes that such reasoning turns the policy of the Entrepreneur's Block on its head. The fact that the F-Block licenses have not had the same troubled history as the C-Block is completely irrelevant as a justification for taking even more spectrum away from Entrepreneurs. When it created the Entrepreneur's Block, the Commission guaranteed that 40 MHz of spectrum out of the total broadband PCS allocation would be made available for Entrepreneurs. Without touching the F-Block, the Commission's compromise proposal already would cut the Entrepreneur's Block allocation by *half* in taking a full 20 MHz away from Entrepreneurs in Tier 1 markets, and by a quarter in taking 10 MHz from Entrepreneurs in Tier 2. Given the extremely weak showing of capacity need by the large carriers, taking yet another 10 MHz by eliminating the F-Block is an extreme and totally unjustified step.

Entrepreneurs like Leap that have relied and depend upon all components of the Entrepreneur's Block policy as the key to mitigating spectrum acquisition costs as a primary barrier to entry in the wireless marketplace. These providers have built business plans around *both* the C- and F-Blocks. And indeed, from this perspective the "equity considerations" cited by the Commission are most compelling with respect to *preserving* the F-Block for Entrepreneurs, not eliminating it. Successful F-Block auction participants bid reasonably in the F-Block auction, and the F-Block licenses have been the single constant amid the stormy restructuring of the C-Block portion of the Entrepreneur's Block program. While the buildout of F-Block licenses in larger markets may have been derivatively affected by the C-Block troubles (in terms

²⁹ *Id.* at ¶ 31.

of capacity or financing), the response should not now be to eliminate the very set-aside that has provided the most stability to the Entrepreneur's Block program.³⁰ The F-Block should remain "off the table" to the extent the Commission implements a compromise proposal.

E. Entities qualifying as Very Small Businesses and Small Businesses under FCC rules in all circumstances should be afforded bidding credits for all licenses to be auctioned.

As Leap has noted repeatedly in these proceedings, and as the Commission has expressly found, the implementation of bidding credits is useful but insufficient from the standpoint of preserving the opportunities of small businesses and Entrepreneurial companies to participate in and grow spectrum-based services. Nevertheless, Leap believes that bidding credits should be offered to those companies that qualify as Small Businesses and Very Small Businesses under Commission rules in all circumstances, which may provide DEs with some useful aid at the margins in the reauction, particularly in acquiring smaller markets.

Leap believes that, for this purpose, a 45% bidding credit for Very Small Businesses, and a 35% bidding credit for Small Businesses, as defined by the Commission, should be created. These bidding credits correspond to those offered by the Commission in its LMDS auctions, which had high percentages of winners as small businesses,³¹ and should at least provide DEs with their best chance to compete with supercarriers at auction in an "open bidding" context.

³⁰ If the Commission somehow concludes that it is vital that even more spectrum should be subject to "open bidding," Leap would not have a strong objection to having the 15 MHz C-Block licenses in Auction No. 35 being made available for this purpose, since these licenses have been repeatedly made available to Entrepreneurs but have remained unsold. *See id.* at ¶ 32.

³¹ *Id.* at ¶ 40.

F. Current C- and F-Block transfer restrictions should be maintained.

Maintaining the integrity of the Entrepreneur's Block program is as fundamentally important in the aftermarket as it is in the auction context. Although the Further Notice proposes a relaxation of the present 5-year holding rule for Entrepreneur's Block licenses,³² Leap urges the Commission not to do so.

First, permitting DEs to "flip" their licenses immediately after winning them at auction will only encourage gamesmanship by large carriers with respect to auction participants. It will undermine the efforts of real Entrepreneurs such as Leap that actually intend to *use* the spectrum to offer competition and innovation in the wireless marketplace.

More fundamentally, maintaining a restricted aftermarket in Entrepreneur's Block spectrum remains an important tool to ensure that Entrepreneurs are able to acquire additional spectrum. In Leap's experience, the large carriers have been intent on "warehousing" and "land banking" every PCS frequency they can purchase on the open market, regardless of whether there is an imminent need to use it or not – and they will not sell it to Entrepreneurs. Forestalling additional competition is in the supercarriers' collective self-interest, but not the public's. If the transfer restrictions are relaxed prematurely, there is a much higher likelihood that spectrum assets will disappear quickly and forever into the gullets of gigantic wireless companies. Leap urges the Commission not to let this happen. The 5-year holding rule should be preserved.

G. The existing Commercial Mobile Radio Service (CMRS) spectrum cap (45 MHz in urban areas and 55 MHz in rural areas) must remain in place.

Finally, Leap agrees with the conclusion in the *Further Notice* that the existing CMRS spectrum cap should remain in place for Auction No. 35.

³² *Id* at ¶ 44.

On September 22, 1999, approximately nine months ago, the Commission released its Report and Order completing a re-assessment of the CMRS spectrum cap, and concluded:

After careful analysis and extensive review of the rules and record in this proceeding, we conclude that at this time the spectrum cap . . . rule [] continue[s] to be necessary to promote and protect competition in CMRS markets.³³

There is no reason or basis to revisit the merits of that recent decision, which affirms the sound policy judgment that there should be a limit on the amount of CMRS spectrum that a single carrier can control in a particular geographic market. The *Further Notice* is correct that the "pleadings filed in connection with the upcoming auction contain no new material information regarding the costs and benefits of the spectrum cap."³⁴

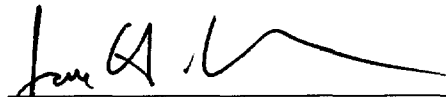
IV. CONCLUSION

Leap once again submits that no sound legal or policy basis has been proffered for effecting sweeping change of the Commission's Entrepreneur's Block rules. However, if the Commission does insist upon moving forward with changes to its Entrepreneur's Block rules and policy, those changes should not be ones that eviscerate the benefits that Entrepreneurial companies are bringing and will continue to bring to U.S. consumers. Accordingly, Leap in the event that the rules are revised, Leap urges the Commission to do so in accordance with the proposals set forth above.

³³ See 1998 Biennial Regulatory Review: Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, 1999 FCC LEXIS 4623 (rel. Sept. 22, 1999) ("1999 Spectrum Cap Order").

³⁴ *Further Notice* at ¶ 50.

By:



James H. Barker
William S. Carnell
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

Counsel for Leap Wireless International,
Inc.

June 22, 2000